



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 5, 2004

Mr. Eddie Martin
Assistant City Attorney
City of Denton
215 East McKinney
Denton, Texas 76201

OR2004-2708

Dear Mr. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198704.

The City of Denton (the "city") received a request for information received by the city in response to a specified Request for Proposals. You claim that release of the submitted information may implicate the proprietary interests of third parties under sections 552.101 and 552.110 of the Government Code, although you take no position as to whether the information is so excepted. You state that you notified PBSJ, Black & Veatch Corporation ("Black & Veatch"), and Raftelis Financial Consulting ("RFC") of the request and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act ("Act") in certain circumstances). We have reviewed the submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, PBSJ has not submitted any comments to this office explaining how release of its proposal would affect its proprietary interests. Therefore, PBSJ has provided us with no basis to conclude that it has a protected proprietary interest in the information at issue. *See* Gov't Code § 551.110(b) (to prevent

disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, this information must be released.

Black & Veatch raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that other law makes confidential. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Black & Veatch has not directed our attention to any law, nor are we aware of any law, under which any portion of its proposal is confidential for purposes of section 552.101. *See* Open Records Decision No. 455 (1987) (absent special circumstances, home addresses and telephone numbers of private citizens generally not protected under Public Information Act's privacy exceptions). Thus, we find Black & Veatch has not demonstrated that section 552.101 is applicable to any portion of its proposal.

Black & Veatch and RFC argue that portions of their proposals constitute commercial or financial information, the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Upon review of Black & Veatch's arguments and its proposal, we conclude that the company has failed to provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of any portion of its proposal. Accordingly, the city may not withhold any portion of the Black & Veatch proposal under section 552.110. As the city and Black & Veatch claim no other exceptions for this information, it must be released to the requestor.

We note that RFC seeks to withhold information that the city has not submitted to this office for review.¹ This ruling does not address the arguments submitted by RFC pertaining to the portion of the proposal that has not been submitted for our review by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under Act must submit copy or representative samples of specific information requested). With respect to the information the city has submitted for our review, we will address RFC's claim under section 552.110(b). Upon review of RFC's arguments and its proposal, we conclude that the company has demonstrated that portions of its proposal are excepted under section 552.110(b) of the Government Code. Thus, the city must withhold the information we have marked under section 552.110(b). We find, however, that RFC has failed to provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the remaining submitted information. Accordingly, the city may not withhold the remaining information in the RFC proposal under section 552.110. As the city and RFC claim no other exceptions for this information, it must be released.

In summary, the city must withhold the marked portions of the RFC proposal under section 552.110. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

¹ Specifically, RFC seeks to withhold its "cost submittal." The city has not submitted this portion of the RFC proposal to this office.

governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/sdk

Ref: ID# 198704

Enc. Submitted documents

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